

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matters of	)	
	)	
	)	
Review of Section 251 Unbundling Obligations	)	
Of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
New Petition for Forbearance of the Verizon	)	
Telephone Companies Pursuant to	)	
47 U.S.C. § 160(c)	)	
	)	

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FOCAL COMMUNICATIONS CORPORATION,  
McLEODUSA TELECOMMUNICATIONS SERVICES, INC.,  
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## SUMMARY

Verizon has filed a new petition withdrawing its previously filed petition for forbearance with respect to any “narrowband elements” that do not have to be unbundled under Section 251 and now requests the Commission to forbear from compelling access to certain broadband functionalities pursuant to Section 271, as a result of the Commission’s analysis in the *Triennial Review Order*. Verizon’s New Petition should be rejected for a number of reasons. First, it asks the Commission to evaluate its New Petition because the Commission has eliminated certain broadband elements from the incumbent local exchange companies’ (“ILECs”) unbundling obligations pursuant to Section 251. The premise of Verizon’s Petition, *i.e.*, that removal of an element from the Section 251 UNE list calls for removal of the corresponding item from the Section 271 checklist, is fallacious. As ratified by the Commission in the *Triennial Review Order*, Section 271 imposes obligations on regional Bell operating companies (“RBOCs”) that are independent of, and go beyond, those obligations imposed by Section 251 on ILECs. In particular, Section 271 contains *independent* unbundling obligations.

Second, Verizon has failed to meet the standards of Section 10. While it is difficult, if not impossible, to conduct a proper forbearance analysis until the parameters of any delisting are known, even a cursory review of Verizon’s Petition demonstrates it fails to meet the exacting requirements of Section 10. Under its Section 10 analysis, the Commission has required a much more mature development of competition in a market than what is evidenced nowadays in the local exchange market. In many areas of the U.S. there is still no competitive choice for consumers, and the only check on RBOC pricing continues to be regulation and not competition.

Section 10(d) precludes any forbearance from any Section 271 provisions until the requirements of Section 271 are “fully implemented.” Contrary to Verizon’s assertion, Section

271 cannot be deemed “fully implemented” at this point in time. Local Markets must be fully opened to competition before the Commission can even begin to consider deregulation. For these reasons, the Commission should summarily dismiss Verizon’s New Petition.

Finally, Verizon claims that by granting this New Petition, the Commission will promote further investment by allowing Verizon to invest significantly in next generation networks. Contrary to Verizon’s view, providing RBOCs additional relief in the form of eliminating unbundled access to broadband facilities from their Section 271 obligations, would not only disrupt competition even further, but as demonstrated by RBOCs past performance, will not have a clear effect of additional investment.

In short, competition is far too nascent and precarious to begin thinking of removal of any Section 271 obligations. Section 271 is a cornerstone of the Act, and it is far too early to consider removing it.

## TABLE OF CONTENTS

I.	VERIZON’S NEW PETITION IS FORECLOSED BY THE LANGUAGE OF THE ACT AND THE TRIENNIAL REVIEW ORDER.....	2
A.	A Finding of Lack of Impairment Under Section 251 Does Not Automatically Lead to Forbearance from Section 271 Requirements.....	2
1.	Section 271 Obligations Are Independent Of, and Go Beyond, The Obligations Imposed by Section 251 .....	3
2.	Checklist Items 4, 5, 6 and 10 Are Independent Obligations .....	4
II.	VERIZON HAS FAILED TO MEET THE STANDARD FOR FORBEARANCE.....	5
A.	Continued Application of Section 271 Checklist Items Is Necessary to Ensure the Continuing Opening of Markets .....	6
1.	Verizon’s New Petition Does Not Meet the Requirements of Section 10(a) .....	6
2.	The Requirements of Section 271 Have Not Been Fully Implemented .....	7
3.	Section 706 Does not Grant the Commission Authority to Review 271 Unbundling Obligations.....	9
III.	ELIMINATING SECTION 271 OBLIGATIONS WILL BE DETRIMENTAL TO COMPETITION AND WILL NOT IMPROVE THE CURRENT LANDSCAPE .....	9
A.	RBOCS will not Necessarily Invest in New Technology by Eliminating their Section 271 Obligations.....	9
B.	The Commission should not deny Consumers Competitive Alternatives to the RBOCs Broadband Facilities in the Context of Section 271 Review.....	11
IV.	CONCLUSION.....	12

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Allegiance Telecom, Inc., Cbeyond Communications, Focal Communications Corporation, McLeodUSA Telecommunications Services, Inc., PacWest Telecomm., Inc., Mpower Communications Corp., El Paso Networks, LLC , and TDS Metrocom, LLC (collectively “Commenters”), through undersigned counsel submit these comments in response to the October 27, 2003 Public Notice seeking comment on the New Petition for Forbearance filed by the Verizon Telephone Companies.<sup>1</sup> In its Petition,<sup>2</sup> Verizon formally withdraws its previously filed petition for forbearance with respect to any “narrowband elements” that do not have to be unbundled under Section 251 and now requests the Commission to forbear from

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<sup>1</sup> CC Docket No. 01-338, Commission Establishes Comment Cycle for New Verizon Petition for Forbearance from Application of Section 271, Public Notice, DA 03-263 (October 27, 2003).

<sup>2</sup> Letter from Susan A. Guyer to Michael Powell, Chairman and Kathleen Abernathy, Kevin Martin, Michael Copps and Jonathan Adelstein, Commissioners, Federal Communications Commission, CC Docket No. 01-338 (filed October 24, 2003) (“Verizon’s New Petition”).

compelling access to broadband functionalities pursuant to Section 271, as a result of the Commission's analysis in the Triennial Review Order.<sup>3</sup> Specifically, Verizon now asks the Commission to forbear from applying items four through six and ten of the Section 271 competitive checklist to the broadband elements that the Commission has found do not have to be unbundled under Section 251, including, fiber-to-the-premises loops, the packet-switched features, functions and functionalities of hybrid loops and packet switching.<sup>4</sup> Verizon erroneously contends that this forbearance is mandated because the *Triennial Review Order* limited unbundling of broadband network elements in certain respects.<sup>5</sup>

For the reasons stated below, the Commission should deny Verizon's Petition.

**I. VERIZON'S NEW PETITION IS FORECLOSED BY THE LANGUAGE OF THE ACT AND THE TRIENNIAL REVIEW ORDER**

**A. A Finding of Lack of Impairment Under Section 251 Does Not Automatically Lead to Forbearance from Section 271 Requirements**

Verizon bases its New Petition for Forbearance on the contention that the *Triennial Review Order* found that ILECs are not required to offer unbundled access to fiber-to-the-premise loops, the packetized functionality of hybrid loops and packet switching because, unbundling of these broadband facilities is not only unnecessary but affirmatively harmful because it would deter deployment by all providers, particularly ILECs.<sup>6</sup> Verizon's contention, however, even if the Commission's finding was otherwise correct, is foreclosed not only by the letter and spirit of Section 271, but also by the Commission's recent interpretation of the independent obligations imposed by Section 271 in the *Triennial Review Order*.

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<sup>3</sup> *Revision of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36 (rel. August 21, 2003) (the "Triennial Review Order").

<sup>4</sup> Verizon's New Petition Cover Letter at 1.

<sup>5</sup> *Id.* at 2-3.

<sup>6</sup> *Id.* at 1.

1. **Section 271 Obligations Are Independent Of, and Go Beyond, The Obligations Imposed by Section 251**

As noted by the Commission in the *Triennial Review Order*, the requirements of Section 271(c)(2)(B) establish an independent obligation of regional Bell Operating Companies (“RBOCs”) to provide access to loops, switching, transport and signaling regardless of any unbundling analysis under Section 251.<sup>7</sup>

As noted by the U.S. Court of Appeals for the Fifth Circuit, Section 251 implements general local competition obligations on all incumbent local exchange carriers.<sup>8</sup> The plain language of Section 271 establishes clearly that RBOCs have an independent and ongoing obligation under Section 271.<sup>9</sup> Thus, it is beyond dispute that Section 271 was designed to impose independent and additional obligations on RBOCs that go beyond the general requirements imposed on ILECs via Section 251. Satisfaction of Section 271 does not automatically follow from meeting the requirements of Section 251.<sup>10</sup>

In the *Triennial Review Order* the Commission ruled that under Section 271, RBOCs must continue to “provide access to loops, switching, transport, and signaling *regardless of any unbundling analysis under Section 251.*”<sup>11</sup>

Verizon suggests to the Commission that the elimination of most unbundling requirements for broadband under Section 251, provided the predicate for forbearing from any stand-alone obligations under Section 271.<sup>12</sup> This argument cannot be farther from the truth.

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<sup>7</sup> Triennial Review Order at ¶ 653.

<sup>8</sup> See *SBC Communications, Inc. v. FCC*, 154 F.3d 226, 231 (5<sup>th</sup> Cir. 1998), *cert denied*, 525 U.S. 1113 (1999).

<sup>9</sup> 47 USC § 271(c)(2)(B).

<sup>10</sup> Triennial Review Order at ¶¶ 653-655.

<sup>11</sup> *Id.* at ¶ 653 (emphasis added).

<sup>12</sup> Verizon’s New Petition at 6.



The Commission has clearly recognized the clear difference between the unbundling obligations of all ILECs under Section 251 and the RBOCs obligations to provide unbundled access to certain network elements under Section 271 analysis.<sup>13</sup> Moreover, the Commission recognized that Section 271 imposes additional requirements on BOCs that were not included in Section 251. These additional requirements reflect Congress' concern repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market.<sup>14</sup>

Accordingly, any action by the Commission with respect to the ILECs' obligation to unbundle access to broadband facilities under Section 251, does not relieve an RBOC's obligation with respect to such network elements pursuant to Section 271.

## **2. Checklist Items 4, 5, 6 and 10 Are Independent Obligations**

Verizon's New Petition asks the Commission to forbear "broadband elements" from checklist Items four through six and ten because such elements are no longer required to be unbundled under Section 251. Verizon notes that the Commission in the *Triennial Review Order* made an in-depth analysis of the relationship between Section 251 and Section 271, but that the Commission failed to mention broadband in such analysis.<sup>15</sup> Verizon's contention is not only legally flawed, but is a cheap attempt at trying to trick the Commission into distinguishing "narrowband" and "broadband" elements in the context of Section 271.

Verizon's New Petition ignores the explicit language of the provisions in the 1996 Act that create independent obligations for the RBOCs. Section 271(c)(2)(B)(iv) requires RBOCs to provide "local loop transmission from the central office to the customer's premises, unbundled

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<sup>13</sup> Triennial Review Order at ¶ 653.

<sup>14</sup> Id. at ¶ 655.

<sup>15</sup> Verizon's New Petition at 7.

from local switching or other services.”<sup>16</sup> Section 271(c)(2)(B)(v) requires RBOCs to provide “local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.”<sup>17</sup> Section 271(c)(2)(B)(vi) requires RBOCs to provide “local switching unbundled from transport, local loop transmission, or other services.”<sup>18</sup> Section 271(c)(2)(B)(x) requires RBOCs to provide “nondiscriminatory access to databases and associated signaling necessary for call routing.”<sup>19</sup>

As the Commission recognized the plain language of Section 271 requires RBOCs to provide UNEs in accordance with Section 251(c)(3) (checklist item two of Section 271) *in addition to* providing access to the specific facilities listed in checklist items four, five, six, and ten.<sup>20</sup>

Thereby, it is clear that, pursuant to Section 271, RBOCs are required to provide access to loop, transport, switching, and signaling/call-related databases network elements regardless of whether these elements are “narrowband” elements or “broadband elements.”

## II. VERIZON HAS FAILED TO MEET THE STANDARD FOR FORBEARANCE

In order to forbear, the Commission, pursuant to the requirements of Section 10(a), must determine that: i) “enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;” ii) “enforcement of such regulation or provision is not necessary for the protection of consumers;” and iii) “forbearance from applying such provision

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<sup>16</sup> 47 U.S.C. § 271(c)(2)(B)(iv).

<sup>17</sup> 47 U.S.C. § 271(c)(2)(B)(v).

<sup>18</sup> 47 U.S.C. § 271(c)(2)(B)(vi).

<sup>19</sup> 47 U.S.C. § 271(c)(2)(B)(x).

<sup>20</sup> Triennial Review Order at ¶ 654.

or regulation is consistent with the public interest.”<sup>21</sup> The Commission must also determine whether forbearance will promote competitive market conditions and enhance competition among providers of telecommunications service.<sup>22</sup> Since the proposed forbearance would involve requirements of Section 271, Section 10(d) requires that the Commission must also determine that the requirements of Section 271 have been “fully implemented.”<sup>23</sup> While Commenters are limited in their ability to conduct a full forbearance analysis given the premature nature of Verizon’s New Petition, even a cursory application of Section 10’s standards demonstrates that Verizon’s New Petition should be dismissed.

**A. Continued Application of Section 271 Checklist Items Is Necessary to Ensure the Continuing Opening of Markets**

**1. Verizon’s New Petition Does Not Meet the Requirements of Section 10(a)**

In applying its forbearance power under Section 10(a), the Commission has heretofore required the development of a much more significant amount of competition than that which the local exchange market currently exhibits. For instance, in determining whether to forbear from the requirements of Sections 201 and 202 of the Act for broadband PCS providers, the Commission clearly suggested that duopoly market power would not be sufficient to support forbearance.<sup>24</sup> The Commission noted that even though the CMRS market was progressing from duopoly market power, it was still not enough for forbearance. The Commission found that:

Nonetheless, the competitive development of the industry in which broadband PCS providers operate is not yet complete and continues to require monitoring.

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<sup>21</sup> 47 U.S.C. § 160(a).

<sup>22</sup> 47 U.S.C. § 160(b).

<sup>23</sup> 47 U.S.C. § 160(d).

<sup>24</sup> *In the Matter of Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100, GN Docket No. 94-33, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶ 21 (1998) (“Until a few years ago, licensed cellular providers enjoyed duopoly market power, substantially free of direct competition from any other source.”)

The most recent evidence indicates that prices for mobile telephone service have been falling, especially in geographic markets where broadband PCS has been launched. These price declines, however, have been uneven, and do not necessarily indicate that prices have reached the levels they would ultimately attain in a competitive marketplace. . . . Furthermore, even if a licensee is providing service in part of its licensed service area, there may be large areas left without competitive service.<sup>25</sup>

The Commission found “that current market conditions alone will not adequately constrain unjust and unreasonable or unjustly and unreasonably discriminatory rates and practices” and, therefore, concluded that the first prong of the Section 10 forbearance standard had not been satisfied.<sup>26</sup>

In the local exchange market, competitive market conditions are much less developed than the CMRS market. In the residential mass market, even taking RBOC statistics at face value, there remains monopoly market power. As previously noted in this docket, the striking example is the special access market where RBOCs continue to charge far above their forward-looking cost and have been raising prices where they have obtained pricing flexibility instead of lowering them.<sup>27</sup> Moreover, unlike the CMRS market, consumers do not have the opportunity to choose from several providers. Over one-third of the zip codes in the U.S. still do not have a competitive provider of local service.<sup>28</sup> Thus, the local market still has an enormous way to go in regard to competition before the Commission should even begin to consider forbearance.

## **2. The Requirements of Section 271 Have Not Been Fully Implemented**

Verizon’s claim that “[T]he Commission’s determination that the checklist has been “fully implemented” for purposes of Section 271 thus necessarily meets the requirements under

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<sup>25</sup> *Id.* at ¶ 22.

<sup>26</sup> *Id.* at ¶ 24.

<sup>27</sup> CC Docket No. 01-338, Reply Comments of The Association of Local Telecommunications Services, *et al.*, at 65 (July 17, 2002).

section 10(d) that the checklist be fully implemented before forbearing from these checklist requirements.”<sup>29</sup> is not only premature but contrary to Congress’ specific intent while drafting Section 10(d).

Section 10(d) clearly evidences a Congressional intent that forbearance in regard to Section 271 provisions should not be entered into lightly. As the Commission has noted, the “fully implemented” language of Section 10(d) demonstrates that Congress considered Section 271 to be a “cornerstone” of the 1996 Act.<sup>30</sup> While the term “fully implemented” is not defined in the Act, it is hard to imagine that the drafters would consider the Act to be fully implemented only seven years after the promulgation of the Act, with CLECs possessing less than ten percent of the local market.

It is hard to contemplate even beginning a discussion of whether Section 271 has been “fully implemented” while Section 271 has only very recently been granted in the majority of the states. The Commission previously declined to forbear from Section 271 requirements in regard to advanced services finding that “Congress did not provide us with the statutory authority to forbear from these critical market-opening provisions of the Act until their requirements have been fully implemented.”<sup>31</sup> With competition still precarious in the local exchange markets, even in those states where Section 271 has been granted, Section 271 is far from being “fully implemented.” For this reason alone, Verizon’s New Petition should be denied.

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<sup>28</sup> *Federal Communications Commission Releases Data on Local Telephone Competition*, FCC Press Release at 2 (July 23, 2002).

<sup>29</sup> Verizon’s New Petition at 4.

<sup>30</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24,012, ¶ 73 (1998).

<sup>31</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188, ¶ 11 (1998).

3. **Section 706 Does not Grant the Commission Authority to Review 271 Unbundling Obligations**

Verizon claims that the goals of Section 706 of the Act require the Commission to forbear under Section 271 to encourage the development of broadband networks and because such broadband elements have specifically been exempt from unbundling under Section 251.<sup>32</sup> Section 706 is irrelevant in the review of Section 271 obligations. In the *Triennial Review Order* the Commission found that section 706 was relevant to its unbundling analysis under the specific “at a minimum” language of Section 251(d)(2), which allowed the Commission to “take Congress’ goals into account” to determine which elements should be unbundled.<sup>33</sup> While the Commission’s broadband unbundling approach was unlawful even under Section 251(d)(2), Section 271 does not in any event contain comparable language. Moreover, Section 271(d)(4) specifically prohibits the Commission from “limiting or extending the terms used in the competitive checklist set forth in subsection 271 (c)(2)(B).”

Accordingly, the Commission may not take into account the goals of Section 706 when reviewing the RBOCs unbundling obligations under Section 271.

III. **ELIMINATING SECTION 271 OBLIGATIONS WILL BE DETRIMENTAL TO COMPETITION AND WILL NOT IMPROVE THE CURRENT LANDSCAPE**

A. **RBOCS Will Not Invest in New Technology Because of Any Elimination of Section 271 Obligations**

Verizon’s New Petition for forbearance claims that the need for forbearance now with respect to broadband elements is especially crucial because Verizon is today designing, testing and planning the next generation networks that will be deployed beginning in early 2004.<sup>34</sup>

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<sup>32</sup> Verizon’s New Petition at 7.

<sup>33</sup> Triennial Review Order at ¶ 176.

<sup>34</sup> Verizon’s New Petition Cover Letter at 1.

Verizon's New Petition claims that forbearance will promote investment, because ILECs are running *well behind* other carriers in their broadband rollout.<sup>35</sup> There is no need to provide additional relief to RBOCs to deploy broadband facilities. Essentially ILECs are holding advanced services deployment hostage. They control the vital last mile facilities and are saying that we will not deploy broadband and make new investment unless the Commission protects them from competition.<sup>36</sup>

Contrary to Verizon's contention, competition, not protection from competition, is the proven spur to new investment. Similar to the DSL experience where RBOCs only offered this technology as a result of the market erosion they were suffering with respect to these services, RBOCs offered ISDN only sparingly in the 1980s even though the technology was developed in the 1970s.<sup>37</sup> The reason was because there was nothing to prod the ILECs to deploy the new technology. Bruce Mehlman, the assistant Commerce Secretary, Office of Technology Policy, noted that RBOCs have reduced incentives to invest in broadband data since there is less competition from CLECs.<sup>38</sup> Providing RBOCs' additional relief in the form of eliminating unbundled access to broadband facilities from their Section 271 obligations, would only disrupt competition even more and will not have a clear effect in additional investment by the RBOCs. The Commission should not compound its errors of the *Triennial Review Order* by forbearing from application of Section 271 unbundling obligations, even if it were lawful to do so.

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<sup>35</sup> Id. at 8 (emphasis added).

<sup>36</sup> Verizon Communications, Inc., et al., v. Federal Communications Commission, et al., 122 S.Ct. 1674 (2002).

<sup>37</sup> Id. at 74.

<sup>38</sup> *Bush Still Undecided on Broadband Policy*, Communications Daily, Vol. 22, No. 100 at 1 (May 23, 2002).

**B. The Commission should not Deny Consumers Competitive Alternatives to the RBOCs Broadband Facilities in the Context of Section 271 Review**

Verizon requests that the Commission forbear from application of 271 unbundling obligations for broadband services and capabilities based on the Commission's analysis that these elements need no longer be unbundled under Section 251. As noted in detail above, Sections 251 and 271 impose independent unbundling obligations on RBOCs.

Further, forbearing from the 271 obligations for these broadband elements would allow RBOCs to maintain monopoly control over broadband capable loops and could deny CLECs access to broadband loops/services even at non-TELRIC rates.<sup>39</sup> The Commission should not deny consumers access to competitive alternatives in circumstances where the incumbent has been relieved of its Section 251(c) unbundling obligations.

If forbearance were to be granted, the ultimate losers will be the consumers who will fail to see alternatives to these facilities. This is why the Commission needs to keep in place checklist requirements and vigilantly enforce them. If not, competitive prospects and consumers will be harmed.

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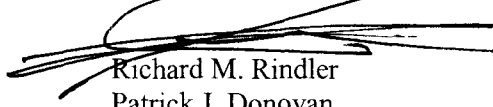
<sup>39</sup> See Request for Waiver of Page Limitation and Opposition to Petitions for Reconsideration, filed by the Association for Local Telecommunications Services ("ALTS"), dated November 6, 2003 (the "ALTS Opposition"), at 22.



#### IV. CONCLUSION

For the foregoing reasons, the Commission should deny Verizon's New Petition for Forbearance.

Respectfully submitted,



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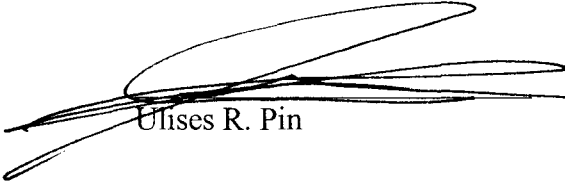
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Dated: November 17, 2003

**CERTIFICATE OF SERVICE**

I, Ulises R. Pin, hereby certify that on November 17, 2003, I caused to be served upon the following individuals the Comments of Allegiance Telecom, Inc., Cbeyond Communications, Focal Communications Corporation, McLeodUSA Telecommunications Services, Inc., PacWest Telecomm., Inc., Mpower Communications Corp., El Paso Networks, LLC, and TDS Metrocom, LLC, on Verizon's Petition for Forbearance in CC Docket No. 01-338.

  
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**Via ECFS:**

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